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No. 93-241

In the Supreme Court of the United States

OCTOBER TERM, 1993

RUTH JAFFE, PETITIONER

v.

HARDY M. SNOW, JR. AND ACCREDITED SURETY & CASUALTY COMPANY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FIFTH DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

PAUL BENDER
Acting Solicitor General

FRANK W. HUNGER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

MIGUEL A. ESTRADA
Assistant to the Solicitor General

MICHAEL JAY SINGER
JOHN P. SCHNITKER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the refusal of the Florida courts to enforce petitioner's Canadian judgment conflicts with federal law or policy.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	7
Conclusion	19

TABLE OF AUTHORITIES

Cases:

Aetna Life Ins. Co. v. *Tremblay*, 223 U.S. 185 (1912)	7
Allen v. *Georgia*, 166 U.S. 138 (1897)	10
Argentine Republic v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989)	9
Bankers Life & Casualty Co. v. *Crenshaw*, 486 U.S. 71 (1988)	12
DeShaney v. *Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989)	13
Disconto Gesellschaft v. *Umbreit*, 208 U.S. 570 (1908)	8, 14
Estelle v. *Dorrough*, 420 U.S. 534 (1975)	10
Filartiga v. *Pena-Irala*, 630 F.2d 876 (2d Cir. 1980)	16, 18
Forti v. *Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987), modified, 694 F. Supp. 707 (N.D. Cal. 1988)	16
Frisbie v. *Collins*, 342 U.S. 519 (1952)	11
Frolova v. *Union of Soviet Socialist Republics*, 761 F.2d 370 (7th Cir. 1985)	14
Goodman v. *Lukens Steel Co.*, 482 U.S. 656 (1987)	13
Graver Tank & Mfg. Co. v. *Linde Air Products Co.*, 336 U.S. 271 (1949)	13
Haitian Refugee Center v. *Gracey*, 809 F.2d 794 (D.C. Cir. 1987)	16
Head Money Cases, 112 U.S. 580 (1884)	9
Hilton v. *Guyot*, 159 U.S. 113 (1895)	5, 7, 8
Jaffe v. *Boyles*, 616 F. Supp. 1371 (W.D.N.Y. 1985)	2
Jaffe v. *Miller*, No. 85-CQ-6103 (Ont. Ct. Justice Mar. 17, 1994)	18

Cases—Continued: Page

Jaffe v. *Sanders*, 463 So. 2d 318 (Fla. Dist. Ct. App. 1984) 2
Jaffe v. *Smith*, 825 F.2d 304 (11th Cir. 1987) 17
Jaffe v. *State*, 438 So. 2d 72 (Fla. Dist. Ct. App. 1983) .. 2
Kaisha v. *U.S. Philips Corp.*, 114 S. Ct. 425 (1993) 14
Kear v. *Hilton*, 699 F.2d 181 (4th Cir. 1983) 2, 3
Ker v. *Illinois*, 119 U.S. 436 (1886) 11
Lascelles v. *Georgia*, 148 U.S. 537 (1893) 11
Molinaro v. *New Jersey*, 396 U.S. 365 (1970) 6, 10
Nevada v. *United States*, 463 U.S. 110 (1983) 13
Ortega-Rodriguez v. *United States*, 113 S. Ct. 1199 (1993) 10
Regina v. *Kear and Johnsen*, 2 W.C.B.(2d) 392 (Ont. H.C.J. May 5, 1986), aff'd as modified, 51 C.C.C.(3d) 574 (Ont. Ct. App. 1989) 3
Siderman de Blake v. *Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), cert. denied, 113 S. Ct. 1812 (1993) . 16
State ex rel. Boyles v. *Florida Parole and Probation Commission*, 436 So. 2d 207 (Fla. Dist. Ct. App. 1983) 2
Street v. *New York*, 394 U.S. 576 (1969) 12
Tel-Oren v. *Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985) 16
United States v. *Alvarez-Machain*, 112 S. Ct. 2188 (1992) 11
United States v. *Belmont*, 301 U.S. 324 (1937) 8
United States v. *Kakwirakeron*, 730 F. Supp. 1200 (N.D.N.Y. 1990) 14
United States v. *Pink*, 315 U.S. 203 (1942) 8
United States v. *Terrazas-Carrasco*, 861 F.2d 93 (5th Cir. 1988) 16
United States v. *Toscanino*, 500 F.2d 267 (2d Cir. 1974).. 17
United States v. *Verdugo-Urquidez*, 494 U.S. 259 (1990).. 12
Webb v. *Webb*, 451 U.S. 493 (1981) 12

Cases—Continued: Page

Zschernig v. *Miller*, 389 U.S. 429 (1968) 8

Constitution, treaty, statutes and rule:

U.S. Const.:
Art. IV, § 1 (Full Faith and Credit Clause) 7
Art. VI, Cl. 2 (Supremacy Clause) 7
Amend. XIV (Due Process Clause) 12, 13
Treaty on Extradition Between the United States of America and Canada, 27 U.S.T. 983 (1976) 4, 9
Alien Tort Statute, 28 U.S.C. 1350 ..... 16, 17, 18
28 U.S.C. 1738 7
1978 Fla. Laws ch. 78-210, § 1 3
1987 Fla. Laws ch. 87-382, § 2 3
Fla. Stat. Ann. (West Supp. 1993):
§ 498.033(2) 2
§ 498.059 2
R.S.C. 1985, c. C-46, s. 279(1)(b) 3
Sup. Ct. R. 14.1(a) 14

Miscellaneous:

American Declaration of the Rights and Duties of Man, O.A.S. Off. Rec. OEA/Ser.L/V/II.65, Doc. 6, at 17 (1985) 15
Conference on Security and Cooperation in Europe: Final Act (Helsinki Accords), 73 Dep't of State Bull. 323 (1975) 14
137 Cong. Rec. S12,131-S12,132 (daily ed. Aug. 2, 1991) ... 3
138 Cong. Rec. (daily ed. Apr. 2, 1992):
p. S4781 14
p. S4783 15
pp. S4783-S4784 15
Draft Articles on State Responsibility, 18 I.L.M. 1557 (1979) 17
Art. 7 17

Miscellaneous—Continued: Page

Exchange of Letters Constituting an Understanding Between the Government of Canada and the Government of the United States of America Concerning the Protocol Amending the Treaty on Extradition Signed at Ottawa on January 11, 1988, 27 I.L.M. 427 (1988) 4, 9
pp. 427-428 ..... 4, 9
p. 428 ..... 4, 9
p. 429 ..... 4, 9
International Covenant on Civil and Political Rights, Annex to G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966) 14
Art. 9(5) 15
Protocol Amending the Treaty on Extradition Between the United States of America and Canada, 27 I.L.M. 422 (1988) 3, 9
Restatement (Third) of the Foreign Relations Law of the United States (1987) 5, 8, 16, 17
Restatement (Second) of Judgments (1982) 13
S. Exec. Rep. No. 23, 102d Cong., 2d Sess. (1992) 14, 15
Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. 1/777 (1948) 15
Art. 8 15
5 M. Whiteman, Digest of International Law (1965) 16

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

Petitioner obtained a judgment against respondents, Accredited Surety & Casualty Co., Inc. (Accredited) and its President, Hardy M. Snow, Jr. (Snow), in Canada. That judgment awarded petitioner damages for the abduction of Sidney L. Jaffe (Jaffe), petitioner's husband, in Canada by agents of Accredited. Petitioner sought to enforce the Canadian judgment in the Florida courts, but those courts declined to enforce the judgment on the ground that to do so would be contrary to a public policy of the State that denies judicial relief to fugitives from justice.

1. Jaffe was charged in 1980 with 28 violations of the Florida Uniform Land Sales Practices Law. Fla. Stat. Ann. §§ 498.033(2), 498.059 (West Supp. 1993). After he was arrested, Jaffe entered into an agreement with Accredited pursuant to which Accredited posted a $137,500 bond to secure Jaffe's presence at trial. Pet. App. A3. The bond gave the surety the express right to apprehend, arrest, and surrender Jaffe to "the proper official at any time provided by law." *Ibid.*

Jaffe subsequently departed with petitioner for Canada, where he took up residence and obtained Canadian citizenship. See *Kear* v. *Hilton*, 699 F.2d 181, 182 n.1 (4th Cir. 1983). After Jaffe failed to appear for his trial, Accredited's bail bond was forfeited to the State, a warrant was issued for Jaffe's arrest, and Jaffe was charged with failure to appear, a felony under Florida law. Pet. App. A4. Accredited then secured the services of Daniel J. Kear, a licensed bondsman, and Timm Johnsen, a bounty hunter, to seize Jaffe and return him to Florida. In September, 1981, Kear and Johnsen abducted Jaffe from his apartment building in Toronto and forcibly transported him to Orlando, Florida, where he was taken into custody by state authorities. See generally *Jaffe* v. *Boyles*, 616 F. Supp. 1371, 1373-1374 (W.D.N.Y. 1985).

Jaffe was tried on the land sales charges and for his failure to appear, and he was convicted of all charges. The land sales conviction was overturned on appeal, however, because of a technical defect in the charging instrument. *Jaffe* v. *State*, 438 So. 2d 72 (Fla. Dist. Ct. App. 1983); see also *Jaffe* v. *Sanders*, 463 So. 2d 318, 319 (Fla. Dist. Ct. App. 1984). Based upon that ruling, Jaffe was released in October, 1983. Pet. App. A4-A5.[1] In the meantime, Jaffe

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[1] Jaffe's efforts while in custody to obtain an early parole release date were opposed by the Florida authorities. See *State ex rel. Boyles* v. *Florida Parole and Probation Commission*, 436 So. 2d 207 (Fla. Dist. Ct. App. 1983). In June, 1983, then-Secretary of State George Shultz filed a statement with the Florida Parole and Probation Commission,

was indicted under Florida's organized fraud statute. *Id.* at A5-A6; 1978 Fla. Laws ch. 78-210, § 1 (repealed by 1987 Fla. Laws ch. 87-382, § 2 (eff. Oct. 1, 1987)). He posted a second bond of $150,000 to secure his appearance on the organized fraud charge. Jaffe eventually returned to Canada; he again failed to appear for trial, and the second bond was forfeited. Pet. App. A5-A6.

Because Jaffe's abduction violated Canadian law, see R.S.C. 1985, c. C-46, s. 279(1)(b), the Canadian government made a formal request for the extradition of Kear and Johnsen to stand trial on kidnapping charges. The United States honored that request. See *Kear* v. *Hilton*, 699 F.2d at 183-184. Kear and Johnsen were both convicted and, on appeal, their convictions were upheld. *Regina* v. *Kear and Johnsen*, 2 W.C.B.(2d) 392 (Ont. H.C.J. May 5, 1986), aff'd as modified, 51 C.C.C.(3d) 574 (Ont. Ct. App. 1989); Resp. App. 16-19. The Ontario Court of Appeal, however, reduced their sentences to "time served" on the grounds that the convictions alone "would go a long way towards the vindication of Canada's sovereignty," and that the "gravity of the affront is mitigated by the circumstances of the offence," because Johnsen and Kear were "men of good character" while "nothing favourable * * * can be said about [Jaffe's] conduct." 51 C.C.C.(3d) at 576.[2]

In 1988, the governments of the United States and Canada agreed to a Protocol to amend the United States-Canadian Extradition Treaty. 27 I.L.M. 422 (1988) (advice and consent of Senate given, 137 Cong. Rec. S12,131-S12,132 (daily ed. Aug. 2, 1991), entered into force Nov. 26,

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urging it to grant parole to Jaffe "on the ground that his continued incarceration will exacerbate the already severe strain placed on the relations of the United States with Canada arising out of circumstances under which Mr. Jaffe was returned from Canada to Florida to face the charges which resulted in his imprisonment." App. C to Brief of the Government of Canada as Amicus Curiae in Support of Petitioner.

[2] We understand that, as result of the conviction, Kear and Johnsen each served two days in jail.

1991)). That amendment replaced the Treaty's schedule of extraditable offenses with a general dual criminality provision and made other technical changes. Compare 27 I.L.M. 422 (1988) with 27 U.S.T. 983-1021 (1976). At the same time, the two governments exchanged letters evidencing certain "understandings." 27 I.L.M. 427 (1988) (Pet. App. A48-A51). In that exchange of letters, the United States agreed: (1) to recognize that transborder abduction by bounty hunters is an extraditable offense; (2) to commence extradition proceedings, upon request, against persons found in the United States who are charged with or convicted of such an offense in Canada; (3) to use its best efforts to honor Canadian requests for testimony and information pertaining to transborder abductions; (4) to cooperate to deter transborder abductions, including the use of best efforts to disseminate information concerning the exchange of letters to those engaged in business as bail bondsmen or bounty hunters; and (5) to consult promptly concerning any case of transborder abduction involving bounty hunters, including cooperation in return of the abducted person. 27 I.L.M. at 427-428 (Pet. App. A48-A49). The letters expressly provided, however, that they were "not intended to create or otherwise alter legal obligations for either Government nor to create or otherwise alter any rights or privileges for private parties." 27 I.L.M. at 428, 429 (Pet. App. A50, A51).

2. In 1985, Petitioner and Jaffe filed suit against Accredited and Snow in the Ontario courts seeking damages for Jaffe's abduction. Pet. App. A6; Resp. App. 20. Respondents sought dismissal based upon lack of personal jurisdiction and *forum non conveniens*. After that request was denied, respondents declined to defend the action, and a default judgment was entered against them. Pet. App. A6. In November, 1990, the court awarded petitioner general and special damages, prejudgment

interest, and costs. The judgment bears interest at an annual rate of 14 percent. *Id.* at A20, A27-A29.

3. a. Petitioner filed the instant suit in late 1990 to recover on the judgment. While expressing "utmost respect" for the Canadian legal system, the Florida trial court denied enforcement. Pet. App. A18-A26. Noting that recognition and enforcement of foreign judgments "depends upon Florida common law principles of judicial comity," the court held that enforcement may be denied if the "judgment is contrary to the public policy of Florida." *Id.* at A21-A22. The court cited four reasons that militated against enforcement of petitioner's Canadian judgment: (1) in contrast to Canadian law, Florida law would not consider apprehension of a bail-jumper to be tortious; (2) Florida public policy approves of the apprehension of a bond-jumper by the surety or its agent; (3) the apprehension in this case was directly the result of Jaffe's own wrongful act in breaching his agreement with Accredited, and Jaffe should not be permitted "to take advantage of his own wrong"; and (4) petitioner's claim is "solely derivative" of Jaffe's and, if petitioner were to collect, Jaffe "would stand to benefit." *Id.* at A23-A24.

b. The District Court of Appeal of the State of Florida, Fifth District, affirmed. Pet. App. A1-A15. The court noted that "Florida[,] in the overwhelming number of cases, recognizes and enforces the judgments of other nations." Pet. App. A7-A8. Relying on *Hilton* v. *Guyot*, 159 U.S. 113, 164-167 (1895), and the Restatement (Third) of the Foreign Relations Law of the United States § 482 (1987), the court emphasized, however, that enforcement of foreign judgments is a matter of "comity," and that "no jurisdiction will give comity to the judgment of another nation that offends that jurisdiction's public policy and sense of moral justice." Pet. App. A7, A8.

The court of appeal held that, had Jaffe himself sought enforcement of a Canadian judgment, "there are many public policy reasons why a Florida court would refuse to

* * * enforce" that judgment—reasons that go "far beyond" the differences between Canadian and Florida law concerning the apprehension of bond-jumpers. Pet. App. A8. The court first noted that Jaffe remains a fugitive from Florida justice, and that Florida courts, like their federal counterparts, follow a "fugitive dismissal" rule. Under the Florida rule, a fugitive from justice is not permitted to call upon the State's courts for resolution of any civil claims or criminal appeals. *Id.* at A9-A11 (citing, *inter alia*, *Molinaro* v. *New Jersey*, 396 U.S. 365 (1970) (per curiam)). In addition, the court noted that Florida law does not permit a contemnor to invoke the protections of the courts unless he first purges the contempt, and that accordingly "persons who flaunt [*sic*] the orders of courts in this state will suffer their cases to be dismissed." Pet. App. A11-A13. Finally, the court adverted to Florida's "well-established public policy that our courts will not permit nor tolerate a person to benefit from his own wrongful act." *Id.* at A13. While Jaffe's abduction was wrongful, the court observed, so was Jaffe's antecedent breach of his contract with Accredited. *Ibid.*

Having concluded that Jaffe could not successfully enforce a foreign judgment in Florida, the court then concluded that petitioner should be "placed in her husband's shoes for purposes of recognition and enforcement of her judgment." Pet. App. A13. The court noted that petitioner's claim is "derivative" under state law, in that the damages she claims flow entirely from Jaffe's abduction. *Id.* at A14-A15 & n.13. Thus, petitioner's claimed loss of consortium "was in the eyes of the Florida courts a rightful loss, because [Jaffe] should have *rightfully* been separated from her while he stood trial and served time in prison after his conviction." *Id.* at A15. Similarly, "[t]he expenses of retaining counsel to defend [Jaffe] in Florida" and the expenses of visiting him in Florida "should *rightfully* have been spent, because [Jaffe] should have returned to this jurisdiction to stand trial."

Id. at A14-A15. In such circumstances, the court concluded, "[t]o allow her to collect on any of these items as 'damages' would be to reward the bondjumper." *Id.* at A15.

c. The Supreme Court of Florida denied petitioner's request for discretionary review. Pet. App. A17.

DISCUSSION

Petitioner challenges the Florida court of appeal's refusal to enforce the default judgment rendered in her favor by a trial court of Canada. Petitioner contends that the refusal to enforce that judgment violates the Supremacy Clause, because international agreements and "overriding federal interests" mandate enforcement. Petitioner also contends that the Florida court of appeal denied her due process by declining to enforce the judgment in her favor on the ground that her claims are merely derivative of her husband's. In our view, the decision below contravenes neither federal law nor any preemptive federal policy. Accordingly, review by this Court is not warranted.

1. a. Enforcement of the judgments of courts within the United States is subject to the Full Faith and Credit Clause of the Constitution, Art. IV, § 1. The Full Faith and Credit Clause, however, does not apply to foreign judgments. *Aetna Life Ins. Co.* v. *Tremblay*, 223 U.S. 185, 190 (1912). Nor does the full faith and credit statute, 28 U.S.C. 1738. Enforcement of the judgments of foreign courts is instead subject to the doctrine of "comity." In *Hilton* v. *Guyot*, 159 U.S. 113 (1895), this Court described that doctrine as follows:

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights

> of its own citizens or of other persons who are under the protection of its laws.

Id. at 163-164. In *Hilton*, this Court eschewed an inflexible rule and enumerated various factors a court may consider in evaluating a request for enforcement of a judgment. See *id.* at 164-165, 202-203. Those factors include, *inter alia*, that there be no "other special reason why the comity of this nation should not allow [the judgment] full effect." *Id.* at 202. And, in a state proceeding like this one, the question of comity concerning enforcement of a foreign judgment initially is one of state, not federal, law. See Restatement (Third) of the Foreign Relations Law of the United States § 481, comment a (1987); *id.* § 482(2)(d); *Disconto Gesellschaft* v. *Umbreit*, 208 U.S. 570, 580 (1908).

This Court has determined that a State may not deny enforcement of a foreign judgment if to do so would be inconsistent with the terms of an international agreement to which the United States is a party. See *United States* v. *Pink*, 315 U.S. 203, 221-234 (1942); see also *United States* v. *Belmont*, 301 U.S. 324, 327, 331-332 (1937). In such circumstances, the power of the State to refuse enforcement "must give way before the superior Federal policy evidenced by [the] treaty or international compact or agreement." *United States* v. *Pink*, 315 U.S. at 231. The Court has also determined that, even in the absence of an international agreement, a state court may not render a judgment that infringes on the federal government's exclusive right to conduct the foreign relations of the United States. See *Zschernig* v. *Miller*, 389 U.S. 429, 432-436 (1968) (holding that a state law that regulates rights of inheritance of foreign nationals on the basis of the State's approval of the foreign nation's form of government is preempted); see also Restatement (Third) of the Foreign Relations Law of the United States § 481, comment a (1987).

Petitioner's principal contention is that the decision below conflicts with the United States-Canadian Extra-

dition Treaty and with the letters exchanged between the United States and Canada in 1988, at the time of signing of the Protocol to that Treaty. Pet. 11-16. The Treaty and the Protocol, however, speak only to the process of extradition of fugitives between the United States and Canada; neither says anything about enforcement of civil judgments in the territory of the other contracting party. See 27 U.S.T. 983 (1976); 27 I.L.M. 422 (1988); Pet. App. A40-A51. The United States is not a party to any treaty with Canada providing for the recognition and enforcement of judgments.

Contrary to petitioner's claim (Pet. 11-13, 15), Secretary of State Shultz's letter undertaking "to cooperate [with Canada] to deter * * * transborder abductions," 27 I.L.M. 427 (1988) (Pet. App. A49), may not fairly be read as conferring upon petitioner a federal right to have her foreign judgment enforced in derogation of the public policy on which the Florida courts relied.[3] An individual ordinarily may invoke an international agreement to which the United States is a party only to the extent that it directly establishes an enforceable private right. See, *e.g.*, *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 442 (1989); *Head Money Cases*, 112 U.S. 580, 598-599 (1884). The governments of Canada and the United States explicitly agreed, however, that their exchange of letters was "not intended * * * to create or otherwise alter any rights or privileges for private parties." 27 I.L.M. at 428, 429 (Pet. App. A50, A51).

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[3] The sentence that immediately follows the undertaking "to cooperate" with Canada supports this conclusion. That sentence provides that the United States will use its "best efforts" to warn those engaged in bail-bonding or bounty-hunting that the United States opposes transborder abductions, and that U.S. abductors will be subject to extradition to, and prosecution by, Canada. 27 I.L.M. at 427-428 (Pet. App. A49). Consistent with that commitment, no similar incidents involving American bail-bonding companies or bounty hunters have occurred since Secretary of State Shultz's letter.

Nor did Florida decline to enforce the Canadian judgment based upon a policy of encouraging or condoning transborder abductions. The "fugitive dismissal" rule, upon which the Florida court of appeal principally relied in denying enforcement, does not depend for its application either on petitioner's identity as a foreign national or on the underlying right (to be free from transborder abductions) that her suit sought to vindicate.[4] So far as the State is concerned, the key point is that Jaffe has evinced such disregard for the lawful processes of the State's courts that he or his representative is not entitled to call upon those courts for resolution of any claims. There is nothing in the "fugitive dismissal" rule that conflicts with the United States-Canadian Extradition Treaty or with the understanding evidenced by the exchange of letters. Indeed, the federal courts have invoked their own supervisory authority to adopt similar rules in a variety of contexts, see, *e.g.*, *Molinaro* v. *New Jersey*, 396 U.S. 365 (1970) (per curiam); *Ortega-Rodriguez* v. *United States*, 113 S. Ct. 1199, 1203-1205 (1993), and this Court has repeatedly upheld against constitutional challenge the exercise of similar powers by state courts, see, *e.g.*, *Estelle* v. *Dorrough*, 420 U.S. 534, 537 (1975) (per curiam); *Allen* v. *Georgia*, 166 U.S. 138, 141 (1897) (noting that the defendant's escape is a "contempt of [the court's] authority, to which no court is bound to submit").[5]

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[4] For example, the Florida courts would presumably have reached the same result if petitioner had been a Florida resident seeking to sue as the assignee of a debt owed by a Floridian to her fugitive husband.

[5] Petitioner also relies (Pet. 13) upon the statement submitted by Secretary of State Shultz to the Florida Parole and Probation Commission, urging it to grant parole to Jaffe on the ground that his continued incarceration "will exacerbate the already severe strain placed on the relations of the United States with Canada arising out of circumstances under which Mr. Jaffe was returned from Canada to Florida." See App. C to Brief of the Government of Canada as *Amicus Curiae* in Support of Petitioner. Petitioner contends that Secretary Shultz's letter evidences a "federal foreign policy interest" that is

b. Petitioner also contends that the decision below undermines the *Ker-Frisbie* doctrine. Pet. 14; Reply Br. 7-8. That doctrine holds that, "except in the case of a fugitive surrendered by a foreign government, there is nothing in the Constitution, treaties or laws of the United States which exempts an offender * * * from trial and punishment, even though brought from another State by unlawful violence, or by abuse of legal process." *Lascelles* v. *Georgia*, 148 U.S. 537, 543 (1893), citing, *inter alia*, *Ker* v. *Illinois*, 119 U.S. 436 (1886); see also *United States* v. *Alvarez-Machain*, 112 S. Ct. 2188 (1992); *Frisbie* v. *Collins*, 342 U.S. 519 (1952). Petitioner relies on a dictum in *Ker* to the effect that the Court's holding that abduction is not a defense to a criminal prosecution did not leave the abducted prisoner "without remedy for his unauthorized seizure." 119 U.S. at 444. That dictum, however, does not help petitioner. While *Ker* suggested that the prisoner would "probably" not be without redress because he "could sue" his abductors for damages and the facts alleged in that case "would without doubt sustain the action," it emphasized that recovery "would probably depend upon moral aspects of the case." *Ibid.* The Florida court of appeal's decision was consistent with that dictum in its reliance on Jaffe's misconduct as the reason for denying enforcement.

In addition, petitioner errs in suggesting that the Florida decision would "immunize transborder kidnappers from any civil accountability." Reply Br. 7. The Florida courts denied enforcement on the basis of Jaffe's mis-

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thwarted by Florida's refusal to enforce petitioner's judgment. See generally Pet. 13-14 & n.9; Reply Br. 2, 8-9. We have been informed by the Department of State that, in contrast to Jaffe's abduction, the question of enforcement of petitioner's civil judgment in this case does not have significant foreign policy implications. Accordingly, as applied in this case, Florida's policy neither frustrates United States policy on transborder abductions nor infringes on the constitutional authority of the Executive Branch in the field of foreign affairs.

conduct in fleeing and remaining a fugitive from justice. Similar misconduct may or may not be present in the case of future transborder abductions; indeed, it does not appear to have occurred in *Ker*, *Frisbie* or *Alvarez-Machain*. There is no reason to assume that all persons who may have a remedy of the sort referred to in *Ker*'s dictum will, like Jaffe, be fugitives from justice.

2. Petitioner alternatively contends that the Florida courts violated the Due Process Clause of the Fourteenth Amendment by burdening her fundamental right to marital association and her right of access to the courts. Specifically, petitioner claims (Pet. 17-18) that Jaffe's abduction by agents of Accredited deprived her of marital privacy, and that application in her suit of the "fugitive dismissal" rule based on Jaffe's conduct unfairly denies her compensation for her own injuries. There is a threshold question of whether petitioner adequately raised these claims below.[6] But putting that potential obstacle to

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[6] The courts below did not address the substantive due process claims that petitioner seeks to raise in this Court. When the highest state court in which review could be had fails to pass on a federal question, this Court will "assume[] that the omission was due to want of proper presentation * * *, unless the aggrieved party in this Court can affirmatively show the contrary." *Street* v. *New York*, 394 U.S. 576, 582 (1969). Petitioner has cited nothing to rebut that presumption. Indeed, she first raised a due process argument in a petition for rehearing in the Florida court of appeal, and even then she said nothing of a right to marital privacy. Instead, she relied on "*Florida's* constitutional requirement of access to the courts" and on Florida cases, with only a passing, conclusory mention of federal principles of "due process." See Pet. Mot. for Reh'g in No. 91-1918, at 8, 12-13 (emphasis added). This Court has declined to review asserted federal claims in similar circumstances. See, *e.g.*, *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U.S. 71, 77-79 (1988); *Webb* v. *Webb*, 451 U.S. 493, 495-499 (1981). In addition, petitioner has not addressed the threshold question of whether an alien who does not reside in the United States may invoke the constitutional protections on which she relies. Cf. *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990).

one side, we do not believe that petitioner's contentions warrant review.

First, petitioner does not appear seriously to dispute that there are some circumstances in which a party is so closely aligned with another that she may be treated as if she were the other party. The concept of "privity" in the law of judgments is one manifestation of that principle. See, *e.g.*, *Nevada* v. *United States*, 463 U.S. 110, 129-130 (1983); see generally Restatement (Second) of Judgments §§ 43-61 (1982). The Florida courts' conclusion that petitioner's claims are derivative of her husband's may be understood as an application of that general principle. Petitioner's constitutional argument essentially attacks the factual underpinnings for that conclusion in this case. See Pet. 17. She has not, however, given this Court any reason to depart from its usual deference to factual determinations in which two lower courts have concurred. *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949); see also *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987).

In any event, it does not appear that petitioner has been denied any rights protected by the United States Constitution. To the extent Jaffe's abduction deprived petitioner of "marital association" (Pet. 17), that deprivation resulted entirely from the conduct of private actors and, accordingly, it did not implicate the Fourteenth Amendment. See *DeShaney* v. *Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 195 (1989). Jaffe's subsequent prosecution in Florida was lawful under the *Ker-Frisbie* doctrine, despite the abduction, and therefore likewise gave rise to no due process violation. A state court's judgment in proceedings to enforce a foreign judgment is subject to Fourteenth Amendment scrutiny, but in this case that state judgment did not cause the invasion of marital privacy of which petitioner complains. Nor can petitioner maintain that she was denied "access to the courts" because her suit was not successful. This Court

has never held that a State's application of neutral public policies to bar enforcement of a foreign judgment deprives the party seeking enforcement of due process of law. See, *e.g.*, *Disconto Gesellschaft* v. *Umbreit*, 208 U.S. at 580 ("We fail to perceive how this application of a well known rule can be said to deprive the plaintiff in error of its property without due process of law").

3. Petitioner's amici contend that several international agreements or declarations mandate enforcement of petitioner's judgment. Petitioner does not herself rely on those agreements or declarations as grounds for contending that the Florida courts were required to enforce the Canadian judgment (see Pet. i), and it therefore does not appear that any claims based on those materials are properly presented for review by this Court. See Sup. Ct. R. 14.1(a); *Kaisha* v. *U.S. Philips Corp.*, 114 S. Ct. 425 (1993) (per curiam). In any event, amici's arguments do not warrant consideration by this Court.

a. Amicus Canadian Helsinki Watch Group (CHWG) contends that enforcement is required by the International Covenant on Civil and Political Rights, Annex to G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966).[7] The Senate gave its advice and consent to the Covenant on April 2, 1992, 138 Cong. Rec. S4781 (daily ed. Apr. 2, 1992), and it entered into force in the United States on September 8, 1992. However, Congress and the Executive Branch agreed at the time of ratification that the articles of the Covenant on which CHWG relies would not be self-executing. See S. Exec.

[7] CHWG also intimates that the failure of courts in the United States to enforce petitioner's judgment might constitute a violation of the Helsinki Accords (officially entitled Conference on Security and Cooperation in Europe: Final Act), 73 Dep't of State Bull. 323 (1975). See CHWG Br. 3, 4. That argument was not raised before the Florida courts. In any event, the Helsinki Accords do not provide petitioner with legally enforceable rights. See *Frolova* v. *Union of Soviet Socialist Republics*, 761 F.2d 370, 375-376 (7th Cir. 1985); *United States* v. *Kakwirakeron*, 730 F. Supp. 1200, 1202 (N.D.N.Y. 1990).

Rep. No. 23, 102d Cong., 2d Sess. 9, 19, 23 (1992); 138 Cong. Rec. at S4783-S4784. Thus, the Covenant does not provide petitioner with any legally enforceable rights.

In any event, CHWG's reliance on the Covenant is misplaced. CHWG relies principally (see CHWG Br. 9-10) on Article 9(5), which states that "[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation." At the time of ratification of the Covenant, however, Congress and the Executive Branch agreed that the "right to compensation" referred to in that article means only "the provision of effective and enforceable mechanisms by which a victim * * * may seek and, where justified, obtain compensation," since "[e]ntitlement to compensation may be subject to the reasonable requirements of domestic law." 138 Cong. Rec. at S4783; S. Exec. Rep. No. 23, *supra*, at 8, 15-16, 22. Thus, even were it individually enforceable, Article 9(5) of the Covenant does not override otherwise-applicable domestic rules, such as the "fugitive dismissal" rule, that may preclude relief in certain circumstances.

b. CHWG also suggests that failure to enforce petitioner's judgment violates Article 8 of the Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. 1/777 (1948), which provides a "right to an effective remedy by the competent national tribunals" for violations of fundamental rights granted by law, as well as Article 18 of the American Declaration of the Rights and Duties of Man, O.A.S. Off. Rec. OEA/Ser.L/V/II.65, Doc. 6, at 17, 22 (1985), which permits every person to resort to the courts to ensure respect for his legal rights. CHWG Br. 10-11. Neither of those Declarations requires enforcement of a foreign judgment based upon a private tort action, and, as we have already noted, the fact that petitioner's claim fails, based on a "fugitive dismissal" rule that is equally applicable to all similarly situated domestic and foreign litigants, cannot fairly be said to deny her appropriate access to American tribunals. More important, those

Declarations do not set forth legal obligations that are individually enforceable. See *United States* v. *Terrazas-Carrasco*, 861 F.2d 93, 96-97 & n.3 (5th Cir. 1988); *Haitian Refugee Center* v. *Gracey*, 809 F.2d 794, 816 n.17 (D.C. Cir. 1987); see also *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 818 (D.C. Cir. 1984) (Bork, J., concurring), cert. denied, 470 U.S. 1003 (1985); 5 M. Whiteman, Digest of International Law 243 (1965).[8]

c. Several of petitioner's amici also contend that Jaffe's abduction violated customary international law and that the United States is responsible under international law if it fails to provide petitioner with a remedy. CHWG Br. 9; International Human Rights Law Group *et al.* (IHRLG) Amicus Br. 25-26; see also Reply Br. 4. They point to comment e to Section 711 of the Restatement (Third) of the Foreign Relations Law of the United States (1987), which states (at 188):

> A state is * * * responsible if it fails to provide to an alien remedies for injury to person or property, whether inflicted by the state or by private persons in circumstances in which a remedy would be provided by the major legal systems of the world.

There has been no showing, however, that "the major legal systems of the world" would enforce the Canadian judgment at the request of a fugitive from justice. In addition, the Restatement's discussion appears to be addressed to the principle of state responsibility when *agents of the state* caused the damage inflicted, either by

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[8] Decisions that have looked to the Universal Declaration of Human Rights as a statement of customary international law, see *Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699, 716 n.15 (9th Cir. 1992), cert. denied, 113 S. Ct. 1812 (1993); *Filartiga* v. *Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Forti* v. *Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987), modified, 694 F. Supp. 707 (N.D. Cal. 1988), involved allegations of torture and are distinguishable. The latter two cases were also brought directly under the Alien Tort Statute, 28 U.S.C. 1350, discussed at pages 17-18, *infra*.

affirmative act or, in certain circumstances, by withholding police protection. See Restatement (Third) of the Foreign Relations Law of the United States § 711 (1987) (a state is "responsible under international law for injury to a national of another state caused by an official act or omission"); see also Draft Articles on State Responsibility, Art. 7, 18 I.L.M. 1557, 1569 (1979). Jaffe's abduction was carried out by private individuals, acting under the authority of neither the State of Florida nor the United States government. See *Jaffe* v. *Smith*, 825 F.2d 304, 307-308 (11th Cir. 1987).[9]

d. Finally, amicus CHWG argues (Br. 13 n.2) that respondents' conduct may amount to a tort in violation of the law of nations within the meaning of the Alien Tort Statute, 28 U.S.C. 1350, and that the failure of the Florida courts to enforce the judgment "ignores" that federal statute. See also IHRLG Br. 16-22. Section 1350 states:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

28 U.S.C. 1350.

We see no conflict between the judgments of the Florida courts in this case and Section 1350. First, Section 1350 confers jurisdiction of certain tort suits on the federal courts; it does not speak at all to claims filed in state court. Second, even if this case had been brought in federal

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[9] *United States* v. *Toscanino*, 500 F.2d 267 (2d Cir. 1974), relied upon by amici, is similarly distinguishable. See *id.* at 269-271. To the extent petitioner's amici contend that Florida's failure to recognize petitioner's judgment amounts to an unlawful "condonation" of the conduct of Kear and Johnsen (see IHRLG Br. 31-32; CHWG Br. 7), their argument fails on the same ground as petitioner's related argument that the judgment below encourages abductions. The Florida courts declined enforcement on the ground of Jaffe's misconduct—his continued fugitivity—not as part of any policy of approving transborder abductions.

court under Section 1350, there would be nothing inconsistent between Congress's determination to "open[] the federal courts" to civil actions by aliens based on violations of the law of nations, *Filartiga* v. *Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980), and the refusal of the court to enforce a foreign judgment based upon Jaffe's fugitive status.

4. There is a final consideration weighing against certiorari in this case. After granting the default judgment against respondents, the Ontario Court of Justice (General Division) held a trial respecting claims that petitioner and Jaffe also asserted against respondents' co-defendants. On March 17, 1994, after the filing of the petition for certiorari in this case, that court found for the co-defendants. In doing so, the court suggested that the default judgment that petitioner seeks to enforce here may have been the result of fraud on the court:

> I have no doubt that Matlow J. [the judge who granted the default judgment] granted judgment in favour of both Jaffe and Mrs. Jaffe on the basis of misstatements or misrepresentations knowingly made to him for the purposes of furthering a scheme to promote the best interest of Jaffe before the courts and Parole Commission in Florida, and allowing a recovery of money to which neither of them are entitled. I have a serious concern about this matter and question whether the judgments of Matlow J. should now be enforced. I think the matter of their validity should be the subject of further consideration on another occasion.

Jaffe v. *Miller*, No. 85-CQ-6103 (Ont. Ct. Justice Mar. 17. 1994), slip op. 60 (Carruthers, J.). In light of this uncertainty concerning the enforceability of petitioner's judgment in the courts of Canada, any doubt about whether the Florida courts erred in declining enforcement of that judgment should be resolved against review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL BENDER*
Acting Solicitor General

FRANK W. HUNGER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

MIGUEL A. ESTRADA
Assistant to the Solicitor General

MICHAEL JAY SINGER
JOHN P. SCHNITKER
Attorneys

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* The Solicitor General is recused in this case.